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Public Prosecutor v Gopal Nair a/l Krishnan

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NOS 45B-19–04 OF 2018, 45B-22–05 OF 2018, 45B-20–07 OF 2020, 45-22–05 OF 2018, 45-21–05 OF 2018 AND 45-24–07 OF 2020
NURULHUDA NUR'AINI JC
28 OCTOBER 2022

C

Criminal Law — Offences — Murder — Accused charged with offence of murder under s 302 read together with s 34 of Penal Code — Grievous hurt — Accused charged with offence of grievous hurt under s 326 read together with s 34 of Penal Code — Whether identification of accused was satisfactory D *— Whether grievous hurt was proven — Whether defence of alibi by first accused was proven — Whether prosecution had proven prima facie case — Penal Code ss 34, 302 & 326*

All three accused were charged with common intention to commit the murder E of Maganthiran a/l Balakrishnan ('the deceased') an offence under s 302 read with s 34 of the Penal Code ('the PC') and causing grievous hurt against Krishnan a/l Arulpardan ('SP12') an offence under s 326 reads with s 34 of the PC. On 24 June 2017, Eswaran ('SP1') who was the deceased's son and also the brother of SP12 received a call from one Karthik ('SP15') at about 4.30am F informing him that the deceased and SP12 were hit and had fallen down. SP15 gave SP1 the location of the scene, which was on a road of Sri Kembangan, said by SP1 to be of about 600m from SP1's home. Another son of deceased named Harikumar ('SP16') also received a call from one Nagarajan ('SP11') informing him that the deceased had been slashed and SP11 notified SP16 the location. G SP16 then headed to the site. On arrival, SP1 saw both deceased and SP12 were on the ground with 'luka potong'. The deceased was still conscious at that time and had notified SP1 of three names Vicky ('the third accused'), Babu ('the second accused') and Gopal ('the first accused') whom SP1 had never met. In the ambulance, the deceased told SP1 that he was knocked down by a car with H another car which came and slashed them. At the site, SP16 approached the deceased and saw slash wound on his arm, two slash wounds on his abdomen, one near the eye and was breathing with difficulty and the deceased said he was knocked down by a car and was slashed by Babu and Vicky. SP16 also saw slash wounds on the head and leg of SP12. Both victims were placed in two separate I ambulance which arrived about 30 minutes later. SP16 said he only managed to speak with them for about five minutes as the deceased was unable to speak and SP12 said he was feeling tired to speak. SP12 said on that day he was on the motorbike with the deceased travelling back after the drinking session they had with SP11 when two cars came and knocked them down. When they fell on the

ground, Babu and Vicky came out from their respective cars and slashed him. Subsequently SP12 said only Babu slashed him and Vicky was behind him slashing the deceased. SP12 also said Gopal was there.

Held, acquitting and discharging all three accused:

(1) SP1 was unreliable as SP1 kept changing his story. The issue on whether the deceased was conscious or not when SP1 arrived at the scene changed drastically in examination-in-chief, cross-examination and re-examination as when asked for clarification in re-examination, SP1 said the deceased only became unconscious when he was in the ambulance and not before. This would then make SP1's evidence that the deceased told him in the ambulance that two cars came and slashed them as undependable. As to SP12, SP1 said he was able to talk but was unconscious. There was no re-examination by the prosecution on this. Hence, whether SP12 was sober and did in fact communicate who had done what on the deceased and SP12 to SP1 was not satisfactorily proven by the prosecution (see paras 6 & 21).

(2) SP16's identification of Babu rested solely on the one liner sentence that SP16 had the occasion to see Babu before as he lived nearby. But yet, there was no evidence adduced from SP16 to satisfy the guidelines in *R v Turnbull and others* [1976] 3 All ER 549 that SP16 was familiar with the facial appearance of Babu that rendered it a case of recognition instead of just a fleeting glance that required a higher standard of proof of identification. Further, the fact that SP16 sought for further identification of the full name of Babu could only mean that there must be more than one 'Babu' known to the deceased and also known to SP16. The identification of Babu was equally not satisfactorily proven by the prosecution. As to Vicky, SP16 was never asked to identify him hence nothing could be deduced from SP16 if the name or person named Vicky mentioned by the deceased was the third accused in this case (see paras 25, 28 & 30).

(3) SP12 repeatedly said the Gopal that was at the scene was not the Gopal that was charged and that was present in court. The first accused was not part of the group of people involved in the slashing incident against the deceased and SP12. Hence, the first accused was ordered to be acquitted and discharged. SP12 agreed that Vicky has an identical twin and the Vicky SP12 was referring to was known as Vicky Vagendesh and not Vicky Vignes ie the third accused. By agreeing that SP12 was talking about Vicky Vagendesh in his testimony, it could only mean that SP12 himself was uncertain of which between the two twins was actually involved (see paras 33–35).

(4) There was confusion on the part of the officer in charge itself on the position of the twins when conducting the ID parade and together with

the non-compliance to state a fundamental waiver of a counsel's presence not once but twice as observed in P13 and P26, the contents of the ID parade reports should carry no weight at all. There was no evidence to deliberate and conclude that SP12 was able to make the distinction between the two twins as the reply given was merely on the surface without any basis to support the answer, hence there was nothing to conclude that he had rightly identified the third accused as the Vicky he said he saw slashed the deceased and himself. The identification of the third accused was not proven on a prima facie standard of credible evidence (see paras 42 & 45–46).

(5) From the evidence of the doctor from the emergency unit ('SP18') and the doctor from surgical unit ('SP19'), despite what was said by SP12 that he was slashed with either a machete or a knife, no incise wound was found on him. In addition, SP12 was found by SP19 to suffer from retrograde amnesia. In history taking, SP12 mentioned he was hit by a car but nothing was mentioned by him of being slashed by any individuals. The absence of such fact in the history taking explained the absence of any incised wound on SP12. Therefore, the fatal incident as alleged did not happen (see paras 47–48 & 50).

(6) Since SP12 had openly denied the involvement of Gopal Nair as the first accused, this supported the notice of alibi put in by the first accused as this denial by SP12 itself should amount to sufficient proof that the first accused was not at the scene on that day and on that particular time. Hence, the identification of the first accused should collapsed. The prosecution had failed to prove a prima facie case against all the three accused (see paras 52–53).

[Bahasa Malaysia summary

Ketiga-tiga tertuduh didakwa dengan niat bersama untuk melakukan pembunuhan Maganthiran a/l Balakrishnan ('si mati') satu kesalahan di bawah s 302 yang dibaca bersama s 34 Kanun Keseksaan ('KK') dan menyebabkan kecederaan yang teruk terhadap Krishnan a/l Arulpardan ('SP12') satu kesalahan di bawah s 326 dibaca bersama s 34 KK. Pada 24 Jun 2017, Eswaran ('SP1') yang merupakan anak kepada si mati dan juga abang kepada SP12 menerima panggilan daripada seorang Karthik ('SP15') kira-kira jam 4.30 pagi memaklumkan si mati dan SP12 telah dilanggar dan jatuh. SP15 memberi SP1 lokasi kejadian yang terletak di jalan Sri Kembangan, yang dikatakan SP1 kira-kira 600m dari rumah SP1. Seorang lagi anak lelaki si mati bernama Harikumar ('SP16') turut menerima panggilan daripada seorang Nagarajan ('SP11') memaklumkan si mati telah ditetak dan SP11 memberitahu lokasi kepada SP16. SP16 kemudiannya menuju ke tempat tersebut. Semasa ketibaan, SP1 melihat kedua-dua si mati dan SP12 berada di atas tanah dengan 'luka potong'. Si mati ketika itu masih dalam keadaan sedar dan telah memaklumkan SP1 mengenai tiga nama Vicky ('tertuduh ketiga'), Babu

('tertuduh kedua') dan Gopal ('tertuduh pertama') yang tidak pernah ditemui SP1. Dalam ambulans, si mati memberitahu SP1 bahawa dia telah dilanggar oleh sebuah kereta bersama sebuah kereta lain yang datang dan 'potong' mereka. Di lokasi kejadian, SP16 menghampiri si mati dan ternampak luka tetak di lengan, dua luka tetak di perut, satu dekat mata dan sesak nafas dan si mati berkata dia dilanggar sebuah kereta dan ditetak oleh Babu dan Vicky. SP16 turut melihat kesan tetakan di kepala dan kaki SP12. Kedua-dua mangsa ditempatkan di dalam dua ambulans berasingan yang tiba kira-kira 30 minit kemudian. SP16 berkata, dia hanya sempat bercakap dengan mereka kira-kira lima minit kerana si mati tidak dapat bercakap dan SP12 berkata dia berasa letih untuk bercakap. SP12 berkata pada hari itu dia menaiki motosikal bersama si mati dalam perjalanan balik selepas sesi minum mereka bersama SP11 apabila dua kereta datang dan merempuh mereka. Apabila mereka jatuh, Babu dan Vicky keluar dari kereta masing-masing dan menetaknya. Selepas itu SP12 berkata hanya Babu yang menetaknya dan Vicky berada di belakangnya menetak si mati. SP12 juga menyatakan bahawa Gopal juga di tempat kejadian.

Diputuskan, membebaskan dan melepaskan kesemua tiga tertuduh:

(1) SP1 tidak boleh dipercayai kerana SP1 berterusan mengubah ceritanya. Isu sama ada si mati sedar atau tidak semasa SP1 tiba di tempat kejadian berubah drastik dalam pemeriksaan utama, pemeriksaan balas dan pemeriksaan semula memandangkan ketika diminta penjelasan dalam pemeriksaan semula, SP1 berkata si mati hanya tidak sedarkan diri apabila dia berada di dalam ambulans dan tidak sebelum ini. Ini, kemudian akan menjadikan keterangan SP1 bahawa si mati memberitahunya dalam ambulans bahawa dua kereta datang dan menetaknya sebagai tidak boleh dipercayai. Mengenai SP12, SP1 berkata dia boleh bercakap tetapi tidak sedarkan diri. Tiada pemeriksaan semula oleh pihak pendakwaan mengenai perkara ini. Oleh itu, sama ada SP12 sedar dan sebenarnya memberitahu siapa yang melakukan apa ke atas si mati dan SP12 kepada SP1 tidak dibuktikan dengan memuaskan oleh pihak pendakwaan (lihat perenggan 6 & 21).

(2) Pengecaman SP16 terhadap Babu semata-mata terletak pada ayat satu baris bahawa SP16 berkesempatan untuk melihat Babu sebelum ini kerana dia tinggal berdekatan. Namun begitu, tiada bukti yang dikemukakan daripada SP16 untuk memenuhi garis panduan dalam *R v Turnbull and others* [1976] 3 All ER 549 bahawa SP16 biasa dengan penampilan wajah Babu yang menjadikannya satu kes pengiktirafan dan bukannya sekadar pandangan sekilas yang memerlukan beban pembuktian pengenalan yang lebih tinggi. Tambahan pula, fakta bahawa SP16 mencari pengenalan lanjut nama penuh Babu hanya boleh bermakna bahawa mesti ada lebih daripada satu 'Babu' yang dikenali oleh si mati dan juga dikenali oleh SP16. Pengenalpastian Babu juga tidak

dibuktikan dengan memuaskan oleh pihak pendakwaan. Mengenai Vicky, SP16 tidak pernah diminta untuk mengenal pastinya justeru tiada apa yang boleh disimpulkan daripada SP16 sekiranya nama atau orang bernama Vicky yang disebut oleh si mati adalah tertuduh ketiga dalam kes ini (lihat perenggan 25, 28 & 30).

(3) SP12 berulang kali mengatakan Gopal yang berada di tempat kejadian bukanlah Gopal yang didakwa dan yang hadir di mahkamah. Tertuduh pertama bukan sebahagian daripada kumpulan orang yang terlibat dalam kejadian tetak terhadap si mati dan SP12. Justeru, tertuduh pertama diperintahkan untuk dibebaskan dan dilepaskan. SP12 bersetuju bahawa Vicky mempunyai kembar seiras dan Vicky yang dimaksudkan SP12 itu dikenali sebagai Vicky Vagendesh dan bukannya Vicky Vignes iaitu tertuduh ketiga. Dengan bersetuju bahawa SP12 bercakap tentang Vicky Vagendesh dalam keterangannya, ia hanya boleh bermakna bahawa SP12 sendiri tidak pasti yang mana antara dua kembar itu sebenarnya terlibat (lihat perenggan 33–35).

(4) Terdapat kekeliruan di pihak pegawai yang bertanggungjawab sendiri mengenai kedudukan kembar semasa menjalankan kawad ID dan bersama-sama ketidakpatuhan untuk menyatakan penepian asas kehadiran peguam bukan sekali tetapi dua kali seperti yang diperhatikan dalam P13 dan P26, kandungan laporan kawad ID seharusnya tidak mempunyai berat sama sekali. Tiada bukti untuk membincangkan dan membuat kesimpulan bahawa SP12 dapat membuat perbezaan antara dua kembar itu kerana jawapan yang diberikan hanyalah di permukaan tanpa sebarang asas untuk menyokong jawapan itu, justeru tidak ada apa-apa untuk menyimpulkan bahawa dia telah mengenal pasti dengan betul tertuduh ketiga sebagai Vicky yang dikatakan dia melihat menetak si mati dan dirinya sendiri. Pengenalpastian tertuduh ketiga tidak dibuktikan berdasarkan standard prima facie bukti yang boleh dipercayai (lihat perenggan 42 & 45–46).

(5) Daripada keterangan doktor dari unit kecemasan ('SP18') dan doktor dari unit pembedahan ('SP19'), walaupun apa yang dikatakan oleh SP12 bahawa dia telah ditetak sama ada dengan parang atau pisau, terdapat tiada luka tetakan ditemui padanya. Selain itu, SP12 didapati oleh SP19 mengalami retrograde amnesia. Dalam catatan sejarah, SP12 menyebut dia dilanggar sebuah kereta tetapi tidak ada yang disebutnya ditetak oleh mana-mana individu. Ketiadaan fakta sebegitu dalam pengambilan sejarah menjelaskan ketiadaan sebarang luka tetakan pada SP12. Oleh itu, kejadian maut seperti yang didakwa tidak berlaku (lihat perenggan 47–48 & 50).

(6) Memandangkan SP12 secara terang-terangan menafikan penglibatan Gopal Nair sebagai tertuduh pertama, ini menyokong notis alibi yang dimasukkan oleh tertuduh pertama kerana penafian oleh SP12 sendiri ini

sepatutnya menjadi bukti yang mencukupi bahawa tertuduh pertama tidak berada di tempat kejadian pada hari itu dan pada masa itu. Oleh itu, pengenalan diri tertuduh pertama harus gagal. Pihak pendakwaan gagal membuktikan kes prima facie terhadap ketiga-tiga tertuduh (lihat perenggan 52–53).]

Cases referred to

Murugan a/l Arumugam lwn Pendakwa Raya [2014] MLJU 1886; [2017] 3 CLJ 377, FC (refd)
R v Turnbull and others [1976] 3 All ER 549, CA (refd)
YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad [2015] 3 MLJ 364; [2015] 1 CLJ 787, CA (refd)

Legislation referred to

Evidence Act 1950 s 32
Penal Code ss 34, 326

Ho Kwong Chin (Deputy Public Prosecutor) (Attorney General's Chambers) for the prosecution.
Sivakumar a/l Govindasamy (The Law Chambers of Siva) for the first accused.
Hasshahari (with Awang Armadajaya) (Hasshahari & Partners) for the third accused.

Nurulhuda Nur'aini JC:

INTRODUCTION

[1] All the three accused were charged with common intention to commit the murder of one Maganthiran a/l Balakrishnan. They were also charged with causing grievous hurt against Krishnan a/l Arulpardan, an offence under s 326 read with s 34 of the same Code. The charges against all three are as follows:

Section 302 charge:

Bahawa kamu bersama-sama pada 24 Jun 2017 pada jam lebih kurang 4.00 pagi bertempat di tepi Jalan Kasturi 9, Bukit Serdang, Seri Kembangan di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian terhadap seorang lelaki bernama Maganthiran a/l Balakrishnan (No KP: 710302-05-5215) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun Keseksaan.

Note: the deceased died a few days later on 30 June 2017.

Section 326 charge:

Bahawa kamu bersama-sama pada 24 Jun 2017 pada jam lebih kurang 4.00 pagi bertempat di tepi Jalan Kasturi 9, Bukit Serdang, Seri Kembangan di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah didapati dengan sengaja

menyebabkan kecederaan parah terhadap seorang lelaki bernama Krishnan a/l Arulpardan (No KP:840726-14-6757) dengan menetak menggunakan parang pada bahagian kepala dan kaki dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 326 Kanun Keseksaan dan dibaca bersama dengan seksyen 34 Kanun Keseksaan.

BACKGROUND AND ISSUES

[2] The second accused became deceased half way through the trial whilst against the other two, at the close of the prosecution case, this court found that the prosecution had failed to prove a prima facie case, thus all the three accused were acquitted and discharged without their defence being called. The public prosecutor dissatisfied with the decision, had lodged an appeal to the Court of Appeal.

[3] The only issue that moved this court to rule that no prima facie case was proven was on the non-satisfactory identification of the first accused, second and the third. In short, the victim Krishnan ('SP12') clearly refuted the first accused's role as being the suspect at the crime scene. The second accused said to be 'Babu' was not satisfactorily identified according to the *Turnbull* guidelines. As to the third accused, no evidence was led as to how a distinction was made to show that it was the third accused that was identified and not his twin brother.

PROSECUTION CASE: FINDINGS BY THIS COURT ON SP1'S EVIDENCE

[4] It started with Eswaran (SP1) who is the deceased's son also the brother of the victim Krishnan (SP12) who on 24 June 2017, received a call from someone name Karthik (SP15) at about 4.30am informing him that the deceased and brother Krishnan were hit and had fallen down. SP15 gave SP1 the location of the scene which was on a road of Sri Kembangan, said by SP1 to be of about 600m from SP1's home.

[5] On the same date, another son of deceased named Harikumar SP16 also received a call from one Nagarajan informing him that SP16's father ('the deceased') had been slashed and Nagarajan notified SP16 the location. SP16 then headed to the site.

[6] Thus, based on the preliminary story given by SP1 and SP16, the critical point to this court's analysis is what was the condition of both the victims and the relevant information conveyed to SP1 and/or SP16 upon their

respective arrival at the scene. This court having heard the testimonies of SP1, found him to be unreliable as SP1 kept changing his story on this material point. These will be laid down below.

[7] It is also important to highlight that the prosecution in putting up together the facts to perform the big puzzle, had called SP15 Karthik the Astro boy to show the presence of motive on the part of the second and third accused in committing this crime against the deceased in particular. SP15 an Astro installer said he could not remember the date but roughly on about 22 June at about 7pm, he was in his car at a parking lot and was about to carry out an installation assignment in that vicinity, when two Indian men came from behind his car and asked the purpose of his presence there.

[8] SP15 said he alighted from his car and went to meet them when he was bullied and slapped by one of them. The other man tried to stop and asked why the need to slap SP15. SP15 left and headed to complete his task. When he returned, he met both the two men again. The man that slapped him was unhappy and took out a knife. This made SP15 ran away to a nearby police station. SP15 identified the man who had slapped him as the third accused whilst the other man identified as the second accused yet SP15 when cross-examined said he did not know both of the suspects and this can be seen in the police report P25 by SP15 as no names of the suspects were mentioned.

[9] However, there was no question asked by the DPP to SP15 if he had attended any ID parade. Thus, any evidence contained in the ID parade report P15 where it was reported that SP15 had in fact identified the second accused or 'B3' in P15, ought not to be considered by this court as either it is hearsay or worst-case scenario, P15 was fabricated. On top of this, the officer in charge ('SP10') was not asked to identify SP15 although he said SP15 attended the ID Parade.

[10] As far as SP15's evidence is concerned; this court is of the view the second accused had not committed anything wrong when he ('second accused') attempted to stop the third accused from slapping SP15. Thus, even if SP15 did identify the second accused, there is nothing offensive or any incriminating act committed by the second accused. As to the third accused, there was no identification by SP15 of the third accused by way of an ID parade. Neither did SP15 able to recall the registration number of the Alza said was driven by the third accused as contained in his police report of the incident in P25.

A RELEVANCY AND ADMISSIBILITY OF SP15 AND DECEASED'S STATEMENT

[11] This incident referred to in short as the 'Astro boy incident' contended by the prosecution that triggered a motive on the part of the accused persons against Maganthiran and Krishnan SP12. Based on the 'Astro boy' SP15's evidence, he had communicated the incident to his uncle name Ravi. The son of the deceased Harikumar SP16 said a day before the fatal incident, his father Maganthiran had told him (SP16) of the Astro boy incident but said it involved Babu who had called and scolded Maganthiran (deceased) on this.

[12] As would have been the contention by the prosecution, the deceased in return would have conveyed this to Nagarajan. However, there was no such evidence from Nagarajan SP11 to suggest that he had received this complaint from the deceased pertaining to the 'Astro boy incident'. With the Astro boy SP15 not knowing who had attacked him at the time of incident as admitted in his evidence and the police report P25, the defence thus raised an objection saying the evidence of the Astro boy SP15 is irrelevant as it merely show bad character evidence and pushed for it to be expunged. Similarly, it was argued that as the deceased was still alive a few days before he became deceased on 30 June 2017, whatever statement made by him does not come under s 32 of the Evidence Act.

[13] This court, having heard the submissions from all parties ruled that the evidence of SP15 is still relevant to show motive, part of same transaction and occasion (see: *YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad* [2015] 3 MLJ 364; [2015] 1 CLJ 787). As to the statement by the deceased, it is relevant and admissible under s 32 of the Evidence Act even though the maker of the statement only died a few days later (see: *Murugan a/l Arumugam lwn Pendakwa Raya* [2014] MLJU 1886; [2017] 3 CLJ 377 (FC)).

[14] This court in dismissing the said application to have the evidence of SP15 expunged is of the further view that even if the decision by this court in rejecting the defence application is wrong, it is still open to the defence to submit that SP15's evidence has no linkage to the current charges of murder and causing grievous hurt. This is added by the fact that SP15 had taken oath and was even cross-examined by the defence. If it did not help to prove anything for the prosecution, the argument by the defence that it merely shows bad character evidence made this court ponder if the defence by arguing so is admitting, to a certain extent the character of 'Babu' and 'Vicky' to be the respective accused persons.

[15] This court however, upon further deliberation on its own volition, refused to entertain this thought nor take this position that there was admission

by the defence on the identity as abundance of cases have set the principle that in criminal cases, it is the duty of the prosecution to prove the identity of the accused. The submission by counsels from the bar table cannot be taken to amount to an admission of any particular fact, the duty of which has been set by the law to be placed on the prosecution's shoulder. With this finding, the burden to prove the identity of the accused persons who committed the crime rests with the prosecution.

IDENTIFICATION: EVIDENCE OF SP1

[16] SP1 testified that he headed to the scene with his sister Dana Letchumi. On arrival, SP1 saw both deceased and Krishnan (SP12) were on the ground with 'luka potong'. The deceased was still conscious at that time and had notified SP1 of three names Vicky, Babu and Gopal whom he (SP1) had never met. In the ambulance, the deceased told SP1 that he was knocked down by a car with another car which came and slashed 'potong' them. As far as the identification of the accused, SP1 was never asked to do so. This court is of the view that this, rightly so as SP1 said he had never met all the three accused.

HEARSAY EVIDENCE

[17] The statement of the deceased to SP1 pertaining to the presence of two cars that came and knocked the deceased down and slashed them were objected to by the defence as 'hearsay' as it was not in the police report lodged by SP1 tendered as P6. The DPP initially argued that it was a dying declaration but then agreed to have it expunged. This change of the stand by the DPP would probably be triggered by the fact that as found by this court in P6 (the police report by SP1), it was stated that it was Krishnan who had notified this to SP1 and not the deceased father.

[18] In cross-examination of SP1, SP1 changed his story when he said the deceased was unconscious when he (SP1) arrived at the scene. Hence, rightly so the objection by the defence as being hearsay was raised and agreed to by the DPP.

[19] When SP1 was asked if Krishnan said anything, SP1 said he (Krishnan) said the same. The defence sought for this part of the statement said by Krishnan contained in P6 be expunged as hearsay and the same can still be sought from Krishnan as he would be called to testify as the name was listed in the list of witnesses tendered as P5. The DPP has no objection for it to be expunged hence on that basis that part of the statement is expunged as agreed by the DPP. The objection, again from this court's view is because no evidence was led as to when Krishnan had said this to SP1 to make the evidence, appear and sound credible but merely responding to a leading question from the DPP.

[20] As it turned out in cross-examination, SP1 said it was Karthik (SP15) who had told SP1 who had done what on the two victims. It also transpired that SP1 was not the first person to be at the scene as SP1 said the ambulance and police were already there and so were the deceased's sons Kumar and Vaskeran. Karthik, however as observed by SP1, was not at the scene (as a note in passing, it is rather unfortunate that no question was asked to SP1 who 'Kumar' is although as it appears from SP16's evidence who is the younger brother of SP1 named 'Harikumar', 'Kumar' mentioned by SP1 would most probably refer to 'Harikumar' SP16 who also came to the scene).

[21] The issue on whether the deceased was conscious or not changed drastically in examination-in-chief, cross-examination and re-examination as when asked for clarification in re-examination, SP1 said the deceased only became unconscious when he was in the ambulance and not before. This, would then make SP1's evidence that the deceased told him (SP1) in the ambulance that two cars came and slashed them as undependable. As to the victim Krishnan, SP1 said he was able to talk but was unconscious. There was no re-examination by the DPP on this. Hence, whether Krishnan was sober and did in fact communicate this to SP1 was not satisfactorily proven by the prosecution.

[22] The next crucial witness would be SP16 Harikumar a younger brother of SP1. SP16 said he received a call from Nagarajan (Naga) on that day at about 4am informing him (SP16) that SP16's father was slashed and Naga notified the location. SP16 headed to said location which was just 500m away from SP16's home, together with his sister Dana Letchumi. At the site, SP16 saw the motorbike on the ground with the father Maganthiran on the grass in between the road and the drain. Krishnan (SP12) was lying near the drain. However, Naga was not seen at the site.

[23] SP16 approached the father Maganthiran and saw slash wound on his arm, two slash wounds on his abdomen, one near the eye and was breathing with difficulty and Maganthiran said he was knocked down by a car and was slashed by Babu and Vicky. As to Krishnan, SP16 said he saw slash wounds on the head and leg. Both victims were placed in two separate ambulance which arrived about 30 minutes later. SP16 said he only managed to speak with his father Maganthiran and with Krishnan for about five minutes as the father was unable to speak and Krishnan said he was feeling tired to speak.

IDENTIFICATION BY SP16 OF BABU AS THE SECOND ACCUSED AND VICKY THE THIRD ACCUSED

[24] SP16 identified Babu in court as the second accused Elangkovan as SP16 said although he did not know him but he could identify Babu as he

stayed nearby SP16's house and he had seen Babu before. It was this Babu, contended by SP16 as notified by Maganthiran to SP16 a day before, that called Maganthiran and reprimanded him on the argument involving the Astro boy. SP16 said he responded saying that it is not their problem but Naga, and Naga should settle it.

[25] Although in cross-examination, SP16 maintained that he was able to identify the second accused referred to as Babu since he had seen Babu before, his identification of Babu rests solely on the one liner sentence that SP16 had the occasion to see Babu before as he lives nearby. But yet, there was no evidence adduced from SP16 to satisfy the *Turnbull* guidelines that SP16 was familiar with the facial appearance of Babu that renders it a case of recognition instead of just a fleeting glance that requires a higher standard of proof of identification.

[26] It is important to highlight that no questions were asked to SP16 when or on what occasion did he see Babu before, at which location did he see Babu before when SP16 said Babu lives nearby, how far away were the two of them when SP16 saw Babu, who made known to SP16 that the person he saw in the vicinity is known as 'Babu', did they ever come face to face to speak to one another hence making it plausible for SP16 to recognise Babu, the time of day when they met, the lighting surrounding the area when he saw 'Babu', all being pertinent matters as laid in the Turnbull guidelines.

[27] It is of significance importance to repeat the guidelines formed in *R v Turnbull and others* [1976] 3 All ER 549 by Lord Widgery CJ extracted below:

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

A All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger ...

B **[28]** None of the above were sought from SP16. It is also important here to recap that the deceased Maganthiran when asked by SP16 at the scene, of Babu's full name, SP16 said Maganthiran did not gave an answer. Thus, to this court's view the fact that SP16 sought for further identification of the full name of 'Babu' could only mean that there must be more than one 'Babu' known to Maganthiran and also known to SP16. Otherwise, if both had a common
C knowledge of the person known as 'Babu', there was no further need for SP16 to ask Maganthiran of Babu's full name. On this basis, this court is of the view that the identification of the second accused is equally not satisfactorily proven by the prosecution.

D

[29] Be that as it may, the second accused became deceased in prison on 16 September 2022 a copy of the death certificate shown and confirmed by the prosecution, when SP20 (IO) was in the midst of cross-examination by counsel for accused 1. The court was informed of this on 21 September 2022. The DPP
E said he had not received any instruction and asked to proceed. Hence, on the date the prosecution closes its case and when called for decision, this court having evaluated all the evidence pronounced a discharged and acquittal against the second accused.

F **[30]** As to Vicky, SP16 was never asked to identify Vicky hence nothing can be deduced from SP16 if the name or person named Vicky mentioned by Maganthiran is the third accused in this case.

IDENTIFICATION: EVIDENCE OF SP12 VICTIM

G

[31] As to the victim Krishnan SP12, SP12 said on that day he was on the motorbike with the deceased Maganthiran travelling back after the drinking session they had with Naga when two cars came and knocked them down.
H When they fell on the ground, Babu identified as the second accused by SP12 and Vicky identified as the third accused came out from their respective cars Alza and Bezza and slashed him.

[32] When asked again subsequently, SP12 said only Babu slashed him and
I not Vicky as Vicky was behind him slashing Maganthiran. SP12 also said Gopal was there with Preem. SP12 said he had known Preem as Preem is a friend of SP12's brother Ramesh and he had met Preem eight months earlier working as security guard with the same company as him (SP12) and SP12 had seen Preem doing his rounds as a security guard.

[33] As to the identity of Gopal, when asked by the DPP, SP12 repeatedly said the Gopal that was at the scene is not the Gopal that was charged and that was present in court. When asked to explain the ID parade (P14) attended and as reported where an identification of the first accused was made by SP12, SP12 maintained the Gopal at the scene is not the first accused.

[34] With this evidence from SP12, whose evidence would be the best evidence available to the prosecution to prove the identity and participation of the suspect known as Gopal but with SP12 consistently saying it was a different 'Gopal' and not the first accused, moves this court to rule that the first accused was not part of the group of people involved in the slashing incident against Maganthiran and Krishnan SP12. Hence, the first accused is ordered to be acquitted and discharged.

[35] As to Vicky, SP12 when cross-examined agreed with the defence suggestion that Vicky has an identical twin and the Vicky SP12 was referring to is known as Vicky Vagendesh and not Vicky Vignes (third accused), which SP12 agreed. SP12's knowledge of the existence of another identical twin of 'Vicky' came from the police during the ID parade. The identification of which Vicky was at the scene could only come from SP12. By agreeing that he (SP12) was talking about Vicky Vagendesh in his testimony, it can only mean that SP12 himself was uncertain of which between the two twins was actually involved.

[36] SP12's identification of the person 'Vicky' only came having seen the Bezza car but nothing was adduced to show the link between the Bezza car and the third accused Vicky Vignes as the evidence from the IO SP20 and SP17 revealed that the Bezza registration number was forged. As a result, who the registered owner of the Bezza car is not known to enable some connection be deduced on the identity of the said 'Vicky'.

IDENTIFICATION OF THIRD ACCUSED IN ID PARADE

[37] As to the ID parade, based on the evidence of the officer in charge SP8, both the identical twins were placed in the same ID parade to be identified by SP12 (see P13) but the identification process was only done once on 30 April 2020 (P13). This, despite the fact that SP8 was aware at that point in time that there were two identical twins present in the said parade. This clearly goes against the IGPSO which provides a safeguard by ensuring that the identification process ought to be conducted twice hence providing a fair opportunity both for the victim to identify the suspect by confirmation of a subsequent fact of a second identification and to the suspect to refute the certainty of the identification alleged by the victim.

[38] The prosecution contended that the subsequent ID parade (report P26) conducted on 3 May 2020 provides proof of SP15's identification of the third accused suspect 'Vicky Vignes'. However, in P26 both the twins were labelled as 'B4' with no further clarification or amendment although the finding as contained in the summary para 14 said the witness SP15 had identified B4 standing at number 7 in the parade. A similar mistake of labelling of 'B4' on both the suspects was also found in ID parade report P13 but an amendment was made on P13 where the second 'B4' on P13 was amended, written on 'B4' as 'B5' (who made the amendment and when is unknown).

[39] Rather unfortunate however, SP15 was never asked if he had attended an ID parade and had identified the third accused in the said parade. This being the best evidence rule, the absence of any evidence from SP15 to show that he did indeed attend an ID parade on 3 May 2020 and had in fact identified the third accused as found in P26, with the utmost regret has to be disregard by this court.

[40] This is added by the fact that SP15 in cross-examination admitted that he did not know the identity of the person who had attacked him during the Astro boy incident when it happened on 22 June 2017. Furthermore, although Harikumar's name (SP16) was mentioned by SP15 to reside at that same location where the incident happened, SP15 did not say he had notified SP16 of the said Astro boy incident that led to SP16 witnessing or observing the two suspects second and third accused at that point of time. Hence, although relevant but yet no evidence was adduced to solidly link the identity of the suspects in the Astro boy incident with the two accused in these present charges.

[41] Most importantly, this court observes that the ID parade report of P13 and P26 reflect that both the suspect Vignes and Vagendash did not require the presence of a counsel during the running of the ID parade but yet no signature by them both were obtained. Hence, whether the ID parade was properly conducted or merely an afterthought created by the police could not be ruled out.

[42] As found by this court the existence of error in the labelling of both the suspects as 'B4', in P13 and P26 and the gross 'oversight' by the police to obtain the suspects signature to suggest their consensus with the absence of counsel was a genuine mistake that was unintended or otherwise, to this court's view gives rise to an inevitable conclusion that there was confusion on the part of the officer in charge itself on the position of the twins when conducting the ID parade and together with the non-compliance to state a fundamental waiver of a counsel's presence not once but twice as observed in P13 and P26, the contents of the ID parade reports should carry no weight at all.

[43] SP17 (IO) said the identification made by SP12 of 'Vicky' during the ID parade was based on the fact that the third accused identified as 'Vicky' in the ID parade has no tattoo on him but this never came out from SP12's own testimony. With the absence of this explanation from SP12, whether he did in fact able to identify 'Vicky' based on the presence of a tattoo or otherwise, is questionable. In particular, nothing was noted in the summary by the officer in charge that this was the position.

[44] In cases involving identical twins and the identification as to who between them committed the actus reus, this court must be guided by the case laws decided either domestically or in other jurisdictions. In *R v Chapman* [2000] All ER (D) 1971 (24th November 2000) (this case in turn, is cited in *R v R & Ors* [2012] EWCA Crim 2611 which concerned two identical brothers. Fulford J thought relevant:

> ... some reference was made to the fact that the appellant had a twin. The thrust of the defence case at trial appears to have been that the two twins were in looks effectively identical, or that any difference lay in fullness of face and changed from time to time. Assuming their looks to have been effectively identical, an identification parade could not have assisted. If both twins were on the same parade, the police officers would have been able to do no more than say that the man seen in Halstead was one or other of the two. If only one or other twin was on a parade, the officers would presumably have identified whichever was on the parade, since he would have appeared identical to the man in the [relevant] photograph. A choice between twins of identical appearance must always have depended on other considerations ... Assuming that there were minor (though perhaps changing) features, such as fullness of face, which might have led to some differentiation between the twins, the police do not appear to have had any notice, or reason to think, at the time that it might have been the appellant's twin ...

[45] This court hence must be very vigilant in the analysis of the presented evidence with the oral testimonies qualifying as the best evidence rule. As observed by this court, when SP12 was re-examined, SP12 said he knew the distinction between the two but nothing was asked further what the said distinctions that was noted by him. No finger print was lifted from the suspected car Bezza based on SP17 (substitute IO), to support any identification made by SP12. Hence, to this court's finding, there is no evidence presented for this court to deliberate and conclude that SP12 was able to make the distinction between the two twins as the reply given was merely on the surface without any basis to support the answer, hence nothing for this dourt to conclude that he had rightly identified the third accused as the Vicky he said he saw slashed Maganthiran and himself (SP12).

[46] With no fingerprint lifted and sent to expert for analysis, the fatal error in the labelling of both the twins as 'B4' found in the ID reports, no further explanation by SP12 as to how he was able to identify 'Vicky' more so he only

knew the existence of an identical pair when notified by the police during the ID parade, the ID parade by SP12 was only held once thus giving rise to a 50% risk of wrong identification, leaves room for doubt on the proof of identity of the third accused. This moved this court to a finding that the identification of the third accused is not proven on a prima facie standard of credible evidence.

GRIEVOUS HURT WHETHER PROVEN

[47] With the sole and most critical issue on identity not satisfactorily proven, for completeness this court would summarily state the finding by this court on the charge of causing grievous hurt whether proven. To satisfy this, two medical doctors SP18 and SP19 were called. From the evidence of SP18 (doctor from the emergency unit) and SP19 (doctor from surgical unit), despite what was said by SP12 (the victim) that he was slashed with either a machete or a knife, no incise wound was found on him.

[48] In addition, SP12 was found by SP19 to suffer from retrograde amnesia. In history taking, SP12 mentioned he was hit by a car but nothing was mentioned by him of being slashed by any individuals. This court finds that the absence of such fact in the history taking explains the absence of any incised wound on SP12.

[49] As to the difference in the diagnosis of SP12, SP19 was of the view that SP12 suffers from mild traumatic head injury as recorded in the medical system of the hospital but the word 'mild' was missing from the medical report prepared subsequently by a different person. SP19 was also of the view that with the indication that SP12 was not wearing a helmet (based on the history on the medical report P28), the probability of SP12 to have fallen and faint arising from the accident is high. Thus, this supports the probability of SP1's evidence as being true when he said that Krishnan SP12 was unconscious at the scene, when SP1 was there.

[50] It is equally crucial to note that the wife of SP12 was present at the emergency unit when history taking was done. SP19 (doctor) said although SP12 mentioned he was hit by a car, he did not mention he was assaulted by someone with a knife, and this despite SP12 was conscious. The further contents of P28 under 'History from patient' in the bracket that says 'wife denied alleged MVA, claimed patient knew the assaulter' came from the wife and not SP12. The wife was not called thus making this inadmissible as hearsay evidence and pushed this court to the finding that the fatal incident as alleged did not happen.

DEFENCE OF ALIBI

[51] One final point that needs to be addressed by this court is on the first accused notice of alibi D30 and investigated by the IOs SP20 and SP17. Based on the investigation by SP20 and SP17 (substitute IO) by interviewing the family of the first accused comprising of four witnesses, all claimed the first accused was at home during that material hours as stated in the charge.

[52] As found by this court that SP12 when testifying in court, had openly denied the involvement of Gopal Nair the first accused. As explained by SP12, he said he did not deny a person by the name of Gopal was involved but maintained that it is not Gopal Nair. This ought to support the notice of alibi put in by the first accused as this denial by SP12 itself should amount to sufficient proof that the first accused Gopal Nair was not at the scene on that day and on that particular time. Hence, the identification of the first accused should collapsed.

[53] In the upshot based on the gaps in the evidence adduced by the prosecution, this court ruled that the prosecution has failed to prove a prima facie case against all the three accused (the second accused included) hence had ordered for all three to be acquitted and discharged.

All three accused acquitted and discharged.

Reported by Ahmad Ismail